Bliss and Laughlin Steel Company, Inc. *and* United Steelworkers of America, AFL-CIO. Cases 13-CA-20996 and 13-CA-21623

2 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 24 September 1982 Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Bliss and Laughlin Steel Company, Inc., Batavia, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's Decision, we find that it is unnecessary to rely on the Administrative Law Judge's animus finding insofar as it is based on employee Miser's testimony that Respondent's officials had stated that union activists Nameche and Hughes were being watched because of a complaint by Miser that they were harassing him.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge, discipline, or otherwise discriminate against employees in regard to their hire or tenure of employment or any term or condition of employment because they engage in union activities or because they participate or testify in proceedings before the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act.

WE WILL offer Steven Hughes and Michael Nameche full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharges, with interest.

WE WILL expunge from our files any reference to the discharges of Steven Hughes and Michael Nameche and WE WILL notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them.

BLISS AND LAUGHLIN STEEL COMPANY, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on March 29, 30, and 31, 1982, in Chicago, Illinois. The complaint alleges that Respondent violated Section 8(a)(4), (3), and (1) of the Act by discharging employees Michael Nameche and Steven Hughes because of their union activities and because they participated in and testified at a Board representation hearing. Respondent filed an answer denying the substantive allegations of the complaint. The General Counsel and Respondent filed briefs.

Upon the entire record herein, including the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all material times, Respondent, a Delaware corporation, has maintained an office and place of business at 766 Hunter Drive, Batavia, Illinois, where it engages in the manufacture of cold finished steel bars. During a representative 1-year period, Respondent sold and shipped

goods and materials valued in excess of $50,000 from its Batavia, Illinois, place of business directly to points outside the State of Illinois. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Charging Party (hereafter the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs about 15 production employees at its Batavia plant in three departments: (1) the raw materials and pickling department where steel coils are unloaded from incoming trucks and bathed in pickling tanks of sulphuric acid; (2) the K-machine department where steel rods are fabricated in various lengths and diameters; and (3) the shipping department where the finished product is packed and dispatched for shipment to customers. Thomas Emerick has been plant superintendent of the Batavia plant since April 1980. From April to October 1980 he reported to Plant Manager Viewig. Viewig left the Batavia plant on October 27, 1980. Between October 1980 and May 1981, Emerick was assisted in the administration and operation of the plant by Kenneth Oakes who was administrative manager and controller.

Nameche was the first employee hired by Respondent when it opened the Batavia facility in June 1977. He was also a longtime union activist. Nameche was involved in two organizing attempts at Respondent's plant by another union, Local 200 of the Allied Crafts Division, United Textile Workers of America, in 1978 and in 1979. The Labor Board found that, in the course of one of the organizational efforts, Respondent committed a number of unfair labor practices, including a threat of reprisal—"discipline or discharge . . . for tardiness"—against Nameche because of his union activities. *B.L.K. Steel*, 245 NLRB 1347, 1352 (1979). Nameche was a union election observer in a Board-conducted election held on October 4, 1979. Local 200 lost that election.

In connection with these organizational efforts, Respondent enlisted the services of West Coast Industrial Relations Association (WCIRA) which was found to have committed unfair labor practices as an agent of Respondent in the prior Board proceeding. Several letters from WCIRA officials to officials of Respondent were introduced into evidence in this proceeding. One, dated August 27, 1979, and addressed to Frank Aughnay, senior vice president of Bliss and Laughlin Industries, recommended the following:

> Consider offering a working foreman's job to Mike Nameche, the union organizer, so as to attach him to management objectives . . . thereby decreasing his ability to campaign aqainst the company and forcing him to place supervisory type pressure on his fellow union adherents . . . .

Another letter, dated October 25, 1979, and addressed to then Plant Manager Ted Viewig, states as follows:

> Our proposed remedy is simple: . . . after the election objections and challenged ballots are resolved, use the work rules in the handbook to build cases on, and terminate the following employees . . . Nameche . . . . These workers should be replaced with non union employees.

Still another letter to Aughnay, dated January 7, 1980, states in pertinent part:

> Unfortunately, as long as Michael Nameche is employed at BLK local management they must devote an inordinate amount of time and attention to employee relations matters.

According to former Acting Plant Superintendent William Ramm, representatives of WCIRA aided in the preparation of Respondent's employee handbook. Ramm subsequently became aware of rumors in the plant of a "hit list," allegedly prepared by WCIRA, targeting certain union advocates, including Nameche, for termination. He discussed the matter with newly appointed Plant Superintendent Emerick after the latter took over that position in April 1980.

Respondent, in its brief, concedes that the WCIRA letters "may evidence some measure of union animus" but argues that their probative value is "outweighed by their having been prepared more than 2 years before the organizing campaign and at a time when the plant was under completely different management." I reject this contention and find that the probative value of the letters is substantial. First of all, the letters refer specifically to Nameche and other union activists. They suggest that unionization is a continuing problem which should be met by long-range solutions such as building a record against the union activists and discharging them or coopting some by promoting them to supervisory positions. Respondent did in fact discharge Nameche and Hughes after broadening their duties and arguing that they were supervisors. Secondly, Respondent has not submitted any evidence that it disavowed the WCIRA proposals or that it announced such disavowal to employees. Moreover, although Emerick was not shown to have been a recipient of the WCIRA letters, William Daugherty, vice president of operations who was present at the Batavia plant when Nameche was fired, was a recipient of a copy of the January 1980 letter specifically discussing Nameche. The addressee of that letter, Senior Vice President Aughnay, is still employed by Respondent. In addition to being specifically informed of the rumored "hit list," Emerick served directly under Ted Viewig, another recipient of the WCIRA letters, for some 6 months in 1980 in which capacity he obviously would have shared the information available to Viewig. Finally, the nexus between Respondent's conduct in the earlier campaigns and the instant campaign is clear. Thus, the January 1980 WCIRA letter suggests a meeting with Re-

spondent's officials to discuss "a specific plan of attack [to] be formulated to avoid another organization drive."[1]

Nameche spearheaded the present effort to organize Respondent's employees, this time on behalf of the Union. He was joined in this effort by Steven Hughes, an employee of Respondent since March 1979. Nameche had participated in two preliminary meetings, one in March and one in June, to discuss organizing the employees on behalf of the Union. The campaign began in earnest with a letter, prepared by Nameche and sent to employees on November 17, 1980, soliciting employees to sign authorization cards. The Union filed an election petition on December 16, 1980. Respondent admitted, in a position statement filed by its counsel in the representation case, Case 13-RC-15649, as follows:

> That Nameche and Hughes are agents of the Union is evidenced by their having distributed authorization cards and campaign literature on its behalf, as well as their having played a very active role in organizing the Employer's employees. Further both Nameche and Hughes presided at Union campaign meetings and answered many questions which were posed by prospective voters.[2]

Respondent contested the inclusion of Nameche and Hughes, as well as Carol Keating, in the election unit on the ground that they were working foremen and thus supervisors within the meaning of the Act and ineligible to vote in the election. Since early November 1980 Respondent had met periodically with Nameche, Hughes, and Keating for the purpose of vesting them with greater duties and responsibilities, including some administrative and budget-related functions. Nameche and Hughes testified at a preelection representation hearing on January 2, 1981, in support of the Union's position that they were employees properly included in the unit.

The Regional Director found that the three working foremen were employees within the meaning of the Act and directed that they be included in the election unit. Respondent filed a request for review with the Board. In a telegraphic order dated March 2, 1981, the Board ruled that the status of the working foremen should be resolved through the challenged ballot procedure. The election was held on March 2, 1981. Of the 14 eligible voters, 6 cast ballots for the Union and 4 against representation. The ballots of the three challenged working foremen were sufficient to affect the results. In addition, Respondent filed objections alleging that Nameche and Hughes as agents of the Union engaged in acts of misconduct.

A hearing was held before a hearing officer on March 30 and April 7, 8, and 9, 1981, to resolve the issues raised by the challenges and objections. Nameche and Hughes again testified on behalf of the Union in support of its position that they were not supervisors and of its defense to Respondent's objections. In a Report on Objections and Challenges dated May 27, 1981, a hearing officer recommended that the challenges to the ballots of the working foremen and Respondent's objections to the conduct of the election be overruled. In an unpublished Decision and Order dated January 28, 1982, the Board adopted the recommendations of the Hearing Officer. The Union was certified on February 12, 1982.

On March 25, 1981, 2 days before its decision to discharge Hughes, Respondent filed an unfair labor practice charge alleging that Nameche and Hughes, as agents of the Union, had restrained and coerced employees in the exercise of their Section 7 rights. The charge was dismissed by the Regional Director and, on appeal, by the General Counsel's Office of Appeals.

The General Counsel submitted testimony by employee George Miser to the effect that Emerick had told him shortly before the election that he was going to watch Hughes and Nameche "until they straightened up." Miser testified to this effect in the representation case hearing. However, in this hearing, he seemed to alter his testimony, stating that Emerick made the remark in response to Miser's complaint that Nameche and Hughes were harassing him. Miser also suggested that an earlier written statement consistent with his representation case testimony was not altogether voluntary because it was given in the presence of a union representative. Miser nevertheless affirmed that his representation case testimony was truthful. Emerick did not testify about this conversation.

It is difficult to determine which of Miser's versions of Emerick's remarks was the truthful one. On the one hand, Miser's testimony in the representation case may have been made at a time when he was free from any realization that his testimony would harm his employer and thus might be more candid. On the other hand, he may simply have failed in his earlier testimony specifically to place the conversation in context. Respondent thereafter filed a charge—subsequently rejected as unmeritorious—that Nameche and Hughes had harassed employees. In any event, Miser's testimony that Emerick told him he would watch Nameche and Hughes, even in the context of an allegation that they were harassing Miser, has some probative value in determining Respondent's animus against Nameche and Hughes, particularly since Respondent had focused on Hughes and Nameche as agents of the Union and the alleged harassment referred to their attempts to sell the Union to their fellow employees. Emerick's statement must also be considered together with the advice of Respondent's agent, never rejected or disavowed, that Nameche and other union supporters be discharged after cases were established against them. Emerick's statement that he would watch Hughes and Nameche thus implicates Emerick in the

[1] Indeed, Emerick had specific knowledge of the role of Hughes and Nameche in the instant union campaign. He and Oakes invited all employees except Hughes and Nameche to a dinner party several days before the 1981 election. About 3 weeks before the election, Emerick noticed a union newspaper which Hughes had left on his desk and commented, "I hope you know what you are doing." Also about this time, Emerick commented that Nameche would have to remove the prounion "stickers" he was distributing "all over the plant."

[2] Respondent objected to the introduction into evidence of position statements prepared by counsel in connection with the representation case on the ground that the statements were confidential. I reserved ruling on the objection. I am now satisfied that the statements are not confidential, that Respondent is bound by the statements, as it is by statements of any of its agents, and that the statements are therefore properly admissible in this proceeding. See *Steve Aloi Ford*, 179 NLRB 229, fn. 2 (1969); *V & W Castings*, 231 NLRB 912, 913 (1977).

overall plan of Respondent to rid itself of union activists, the most prominent of which were Hughes and Nameche.

B. *The Discharge of Hughes*

Respondent decided to discharge Steven Hughes on March 27, 1981, and effectuated the decision by issuing a termination notice to Hughes on March 31, 1981. At the time, Hughes was working foreman in the raw materials and pickling department. He was ostensibly fired for refusing to review and sign a contract on behalf of Respondent for "waste transportation and removal." Respondent's termination notice, signed by Oakes, first describes Hughes' duties as working foreman in accordance with Respondent's view, which it was pressing in the pending postelection representation proceeding, that Hughes was a supervisor within the meaning of the Act. Respondent has dropped the contention that Hughes' duties showed he was a supervisor but contends that they were sufficiently enhanced after October 1980 to require him to review and sign the contract. The termination notice goes on to describe Hughes' refusal to sign the Mr. Franks contract "upon advise [sic] of counsel" as "gross insubordination" in accordance with "disciplinary policy" set forth in the employee handbook.

Hughes was responsible for the removal and replacement of sulphuric acid in his department. This task was performed by an independent contractor, Mr. Franks, Inc., which had provided such service for Respondent for some time and with whom Hughes dealt regularly in the course of his work. Hughes was the so-called vendor contact between Respondent and Mr. Franks. Hughes credibly described his contact with Mr. Franks as follows:

> I would monitor the iron level in the pickle tanks. When it reached a certain level I would fill out a purchase requisition and give it to Tom Emerick to sign or initial. When he initialed it I would turn it in and call Mr. Franks.

Hughes had no responsibility whatsoever for the purchase order procedure which provided for payment to the vendor, here Mr. Franks.

In December 1980, Hughes received a contract for waste removal and other documents from Mr. Franks in the mail. He brought the materials to Oakes and asked what he wanted done with them. Oakes said he was going to have the materials reviewed by Respondent's attorneys. Nothing more was said about the Mr. Franks documents until early March 1981 when Oakes brought the material back to Hughes and told him that the attorneys had approved the contract. According to Hughes, Oakes asked him to "look it over. That I could sign it or if I didn't want to he would sign it." Hughes responded that he did not think it was his job "to sign anything that said BLK Steel, a Delaware Corporation on it. He also agreed to "look [the contract] over" and "get it back to" Oakes. On several occasions thereafter Hughes attempted to return the documents to Oakes but Oakes insisted that he sign the contract. Hughes testified that he never got back to Oakes to discuss the provisions of the contract. He testified that he looked over the contract and "told [Oakes] I thought I understood what was in the contract. I also told him that I didn't feel it was my job to sign it."

Oakes testified that, in early March, Respondent's corporate office informed him that there were no legal problems with the Mr. Franks contract and advised him "[i]f it fits your operation to go ahead and take care of it." Later Oakes elaborated that he had called an engineer at Respondent's Harvey, Illinois, plant in January or February and that the latter called him back to tell him of the position of the corporate office. Oakes then referred the contract to Hughes. He testified that he asked Hughes to review the contract, summarize it, give him his recommendation, and "if everything is in order . . he could go ahead and sign it."

On March 24, 1981, Oakes asked Hughes if he had reviewed the contract. Hughes said he had not. Hughes told Oakes he had problems with signing the contract because of fear that he might have some personal liability. Oakes assured him he "would be signing it on behalf of the company." According to Oakes, "when I said I needed it by the end of the week he said, okay, he would have it done by then."

On Friday, March 27, 1981, about 1 p.m., Oakes again spoke to Hughes about the contract and insisted that the matter be resolved by the end of the day. About 3 p.m., Hughes came into Oakes' office with Nameche. He returned the contract to Oakes and stated that he was refusing to sign it on the "advice of counsel." Hughes described the reason for his action as follows:

> At that particular time we were going to hearing to decide on our supervisory status. The pressure that last day was also my opinion if I sign it, the damn thing would end up the following hearing day in court. At the time I didn't feel it was my job to sign that contract.

Hughes was given his termination notice when he returned to work on March 31. On March 30, Hughes had been present at the Board postelection hearing. Hughes told Oakes he felt he had been baited. Oakes replied that it did not matter whether he was baited or not; he had "refused to sign, and that was gross insubordination and it wouldn't be tolerated." Oakes did not deny this conversation. Oakes testified that he and Emerick made the decision to terminate Hughes. He also testified that he never discussed the contract with Emerick although Emerick had responsibility to oversee all plant operations, including acid and sludge removal, the subject matter of the Mr. Franks contract.

Oakes testified that after discharging Hughes he never even looked at the contract until he left the Batavia plant on May 31, 1981. He professed that he "never had the time." Neither he nor any other official of the Batavia plant signed the contract. According to Oakes, "I put it in my basket on my pile of things to look at or things to do."

Oakes had testified at the preelection hearing on January 22, 1981, and again at the postelection hearing. He admitted, in the preelection hearing, that his intention in delegating greater responsibilities to the working fore-

men was to have them "effectively recommend discipline, discharge, or transfer or adjust the grievances of employees." Oakes was thus aware of the contested supervisory issue in March 1981 when he pressed Hughes on the Mr. Franks contract.

After Hughes' discharge, Oakes and Emerick filled in for him. Hughes was not replaced, at least until May 31, when Oakes left. Oakes testified that Hughes was "vital to our organization in that area," presumably referring to the pickling department.

Emerick's testimony on the Hughes matter was sketchy even though, according to Oakes, he participated in the decision to discharge Hughes. Emerick's testimony on the matter was guarded and evasive, especially his allegations that he knew nothing about the contents of the Mr. Franks contract. He did testify, in response to my question, that no Respondent official ever signed the Mr. Franks contract which Hughes had returned to Oakes unsigned. At some unspecified point, according to Emerick, the Batavia plant "fell under the jurisdiction of the Harvey facility" and all purchasing was done through the Harvey facility. He stated, "since they had signed the contract with Mr. Franks it wasn't necessary that we did." He did not know whether the Harvey plant had signed the Mr. Franks contract before or after the Hughes discharge.[3]

The General Counsel has clearly shown, at least *prima facie*, that Respondent fired Hughes for discriminatory reasons. Respondent had been advised by its labor relations agent to rid itself of union supporters by building a record against them relying on employee handbook violations. Emerick had vowed to watch Hughes and Nameche. Respondent knew that Hughes and Nameche were the two leading activists on behalf of the Union. It had filed unmeritorious charges alleging that they had harassed employees in the preelection campaign just 2 days before the decision was made to discharge Hughes. The timing of Hughes' discharge shortly after the election and in the midst of a Board proceeding also supports the inference of discrimination. Indeed, the discharge decision came on March 27, 3 days before a postelection hearing which was to consider the issue of Hughes' supervisory status. Hughes had testified in the preelection hearing on behalf of the Union's position that he was not a supervisor. Respondent had insisted he was and sought to enhance his responsibilities in order to strengthen its case.

I believe that Respondent seized upon a pretext—Hughes' refusal to sign the Mr. Franks contract—in order to discharge him for his union activities and his having testified in a Board proceeding contrary to Respondent's interests. First of all, the thrust of Oakes' testimony was that he wanted Hughes to summarize the Mr. Franks contract and to recommend whether it should be signed or not. He seemed particularly interested in deemphasizing the requirement that Hughes himself sign the contract. Yet at no time did Oakes ask Hughes to give him a recommendation as to whether the contract could be signed without also insisting Hughes himself do the signing. Had Oakes really been concerned with a legitimate business reason—namely, getting Hughes' view on whether the contract was beneficial for Respondent or whether it fit the Batavia operation—he would have asked him that question directly without also insisting on the condition that Hughes sign the contract. This is particularly significant not only because Oakes knew Hughes' objection to signing for fear he might be personally liable but also because Oakes clearly knew that he and Hughes were on opposite sides on the issue of Hughes' supervisory status, an issue that was to be litigated in late March or early April before a Board hearing officer. Oakes had testified in the preelection hearing that he sought to enhance Hughes' duties in order to make him a supervisor. This tactic had been recommended as a way to deal with union activists. Thus, Oakes focused on Hughes signing a contract on behalf of Respondent in hopes that it would provide evidence in support of Respondent's position that Hughes was a supervisor.

That Hughes' signature on the Mr. Franks contract and indeed his analysis of the contract were not significant business requirements is shown by Respondent's handling of the Mr. Franks contract after the discharge of Hughes. It sat around on Oakes' desk until he left Respondent's Batavia plant at the end of May 1981. No one signed it and no one from the Batavia plant reviewed it, even though Oakes and Emerick took over Hughes' responsibility for dealing directly with Mr. Franks after Hughes' discharge. Emerick testified that he never concerned himself with the details of the contract, and, since another of Respondent's plants had signed the contract, there was no need for him to do so. Apparently, Respondent signed the contract covering the Batavia plant with no analysis whatever of whether it fit the Batavia plant's situation. Respondent's corporate office had, of course, approved the contract even before Oakes began pressing Hughes on the matter. This leaves open the question of why Respondent insisted that Hughes analyze the contract and sign it and why it was in such a hurry to get him to do so. Since no legitimate business reason appears on this record, the only inference I can make is that Respondent was attempting to construct a pretext to mask its discriminatory discharge of Hughes.

My analysis of Oakes' testimony and his demeanor as a witness also convinces me that he would not have fired Hughes in the absence of his union activities and his testimony against Respondent's interests in the Board representation case. I found Oakes to be a thoroughly unreliable witness. His repeated expressions of "shock" that Hughes refused to sign the contract were evidence of his exaggerated testimony. Oakes also exaggerated his concern with Hughes' analysis of the contract as opposed to his signature. This was completely controverted by Oakes' lackadaisical attitude toward any analysis of the contract after Hughes' discharge. Oakes admittedly let the contract sit around on his desk unsigned and unana-

[3] According to Emerick, the "announcement for the total takeover of BLK" was sometime in April and before then "we were doing our own purchasing." It is unclear whether this so-called takeover had anything to do with the signature of the Mr. Franks contract by officials of Respondent and its application to the Batavia plant. It is clear, however, that neither Emerick nor Oakes nor anyone else connected with the Batavia plant analyzed the contract to determine whether it fit the Batavia operation.

lyzed for 2 months until he left the Batavia plant. He professed not to have time to address himself to the matter. Oakes also testified that he did not know the contents of the contract or discuss the contract with Emerick. I find it implausible that he would not have taken the time to analyze the contract himself or do so in conjunction with Emerick or the engineer at the Harvey plant to whom he had spoken in January or February if he indeed was as concerned with it as he seemed to be when he dealt with Hughes. In short, I do not credit Oakes' testimony on the Hughes matter, particularly his self-serving denial that he was motivated by improper considerations in discharging Hughes.[4]

In these circumstances, I find that the General Counsel has proved that Respondent discharged Hughes for discriminatory reasons and would not have fired Hughes for refusing to sign the Mr. Franks contract if he had not been a union activist and instrumental in testifying contrary to Respondent's interests in a Board proceeding.

C. *The Discharge of Nameche*

Nameche was discharged on September 29, 1981, after he allegedly reported 10 minutes late for work that day. He had previously been issued a second written warning under Respondent's no-fault tardiness and absenteeism program. Under the program, which was instituted in August 1980, an employee accumulates credits in each of two categories—absence or tardiness-leave early—for each month in which he has a perfect record. An employee may accumulate a total of five credits. When an employee is tardy or leaves early in any given month, whether authorized or not, he is assigned a demerit for each infraction. No excuses are accepted for tardiness except for injuries on the job or death in the family. When an employee accumulates two demerits in excess of earned credits, he receives a first written warning. When he accumulates three demerits in excess of earned credits, he receives a second written warning. When he receives four demerits in excess of earned credits, he is terminated. An employee who has three demerits, and who, thereby, receives a second warning, may cancel one demerit, and, with it, the second warning, by going one full month with a perfect record.

Nameche, who was the first employee fired for violating the no-fault rule, was 2 days short of canceling his second warning when he was fired for being late on September 29. Although there is a conflict in testimony as to how Nameche became aware of his standing under the no-fault problem, it is clear that he received his second written tardiness warning on August 21, 1981. At this point he had three demerits. One more demerit would mean he would be terminated. On the other hand, if he went the entire month of September without being late, he would cancel his second warning and return to having only two demerits.

It is unclear on this record what constitutes tardiness. The working day begins at 7 a.m. However, Respondent's written no-fault program contains no definition of tardiness. A written warning letter issued to employee Joe Henderson on October 5, 1981—several days after Nameche's discharge—states that Respondent's policy is that employees "should be on the floor and ready to start work at 7:00 AM." The testimony of Maintenance Foreman Jerry Sipek and Emerick is confusing and indeed conflicting on whether employees were required to be in the plant or at their work stations at 7 a.m. or at 7:05. The distinctions are important because it is clear that employees often dawdled in the employee locker room or at the coffee machine before reporting to their work stations. Sipek initially testified that employees were required to be at their work stations at 7 a.m. and, in response to a leading question, that they had a grace period of 5 minutes to get to "their work stations." Later he testified "as far as I know . . . the employees were allowed five minutes to get into the building to be there on time." He also testified that Emerick mentioned this grace period to him at some unspecified time, but that he was not aware that employees were told about any grace period. Emerick testified at one point that an employee is not considered tardy if he arrives at the plant at 7 a.m. Later, on redirect, he carefully stated that, before a tardiness demerit is incurred, an employee has a 5-minute grace period within which to arrive at the plant. He also stated that if an employee is "late getting to the work floor on time, I started with an oral warning." In a September 16, 1981, warning letter to employee Henderson—a letter written before the Nameche discharge—Emerick cited Henderson for numerous tardiness violations but made no distinction between reporting at the plant or reporting to his work station. Neither that letter nor the October 5 letter to Henderson mentions any grace period. Thus, it appears that Respondent's rule on exactly what constitutes tardiness was not clear either to Respondent or to employees.

The lack of clarity on the exact definition of tardiness is exacerbated by the fact that Respondent does not have a mechanical timeclock which permits employees to punch in their timecards upon reporting for work. Respondent does have timecards which are used to formulate employee attendance records for each employee under the no-fault program. However, the employees are expected to write their starting times on their own time-

[4] Respondent's contention that Hughes and other employees had often signed rental agreements with commercial rental companies for the short-term rental of tools and equipment is unavailing. First of all, there is no evidence that employees independently made the decisions to rent tools; the act of signing the rental agreement and picking up the tools was ministerial. In contrast, the Mr. Franks agreement involved the corporate commitment to a business relationship. Moreover, there was undoubtedly a legitimate business reason for employees to be sent out of the plant to rent tools and equipment on a short-term basis. Here, there was no legitimate business reason to have Hughes, and Hughes alone, sign the Mr. Franks contract. From the record evidence it appears that the Mr. Franks contract was more involved than the simple rental agreements introduced into evidence by Respondent. It was sufficiently involved to require review and approval by Respondent's corporate office. Indeed, Respondent, which presumably had possession of the contract, never introduced it into evidence to show that it was similar to the rental agreements routinely signed by employees as agents of Respondent. In any event, Respondent's contention does nothing to refute the overwhelming evidence that Hughes' refusal to sign the Mr. Franks agreement was not the real reason for Respondent's action. Indeed, Respondent's suggestion that Hughes should have signed the Mr. Franks agreement just as he signed agreements to rent tools on a short-term basis confirms that Oakes was concerned only with Hughes' failure to sign the agreement and not his alleged failure to review and summarize it.

cards. Emerick conceded that unless he noticed that an employee was late there was no way to check the accuracy of the timecard entries and that "they might get lucky and falsify the records." Even the employee attendance records were inaccurate. Respondent claimed that Nameche actually had an extra demerit for tardiness which it had overlooked and employee Henderson's record failed to reflect four absences Respondent claimed he had incurred between June 22 and September 16, 1981. Finally, there is considerable uncontradicted evidence by employees that Emerick often readjusted clocks in the production office and in the main office.

Because of the unreliability of all of the above criteria for determining tardiness, I view with considerable skepticism Respondent's testimonial and documentary evidence relating to tardiness offenses presented in this case.

On September 29, Nameche rode to work with Al Hammer, an employee assigned to Respondent from Manpower Temporary Services in September and October 1981. Nameche testified that he heard a radio announcement that it was 6:58 a.m. just as Hammer was parking his car in front of the plant about 30 feet from the main entrance. Hammer testified that he heard a radio announcement stating that it was 6:56 shortly before he pulled into the parking lot. It took Hammer about 1 minute to park his car. Hammer and Nameche immediately entered the plant. Hammer went directly onto the production floor and Nameche went into the locker room. Under either Hammer's account or Nameche's account, it is clear that both men entered the building at or before 7 a.m.

Nameche stayed in the locker room "just long enough to slide on my safety shoes and put on my hard hat." He saw employees George Miser and Joe Henderson in the locker room. He then "proceeded onto the shop floor." As he did so, he encountered Emerick. They had a brief conversation and Emerick directed him to a particular section of the plant. It is uncontradicted that Emerick said nothing at this time to Nameche about being late. There is also no evidence that Emerick, who was specifically checking on the time each employee was arriving onto the plant floor, said anything to Hammer about being late.

About 10 a.m. Maintenance Foreman Jerry Sipek approached Nameche and asked him what time he arrived at work. Nameche told him he had arrived at 7 a.m. Since this was an unusual request, Nameche asked Sipek why he wanted to know. Sipek said, "Well, I guess the girls in the office need it."[5]

Shortly before noon, Nameche was summoned to Emerick's office by Sipek who accompanied him there. When the two men arrived at the office, Emerick's door was closed. Emmerick was talking to Tom Daugherty, a high official of Respondent. A few minutes later, Daugherty left and Emerick and Sipek went inside. Emerick told Nameche he was being terminated because he was late that morning. Nameche protested that he was not late and told Emerick, "Hey, Tom, if I was going to be late I would have walked in the damn door." This was a reference to the fact that Nameche was in a positive position insofar as absences were concerned and he could have taken the day off without jeopardizing his tardiness position as he had done on one previous occasion when he would have been tardy.

Nameche appealed his dismissal to another official of Respondent but the appeal was denied.

Emerick and Sipek testified that Nameche was told, in his discharge interview, that Sipek had made a "sweep" of the locker room at 7:05 and did not see Nameche and that Emerick did not see Nameche come onto the production floor until 7:10.

The overwhelming evidence is that Respondent fired Nameche for his union activities and for his testimony before the Board contrary to Respondent's interests. Nameche, the most senior employee, was also the most prominent union activist. He was specifically targeted by Respondent's labor relations agent for discharge. The discharge was to be accomplished by building a record against him. In an earlier case, the Board found that Respondent had unlawfully threatened to discharge him for tardiness. And Respondent had already discriminatorily discharged Steven Hughes, the other "union agent" who had been targeted by Respondent along with Nameche, because of his alleged "harassment" on behalf of the Union. That Respondent actually fired Nameche as specified and suggested sometime before substantiates the inference of discrimination.

Respondent's reason for discharging Nameche—his alleged tardiness on September 29—was a pretext to mask the real reason, Nameche's longtime union activities and his testimony against Respondent's interests. First of all, Nameche was not late on September 29. He and Hammer credibly testified that they arrived at the plant together about 7 a.m. Hammer's testimony is borne out by the fact that he was not penalized for being late even though Respondent allegedly knew he arrived at the plant at the same time as Nameche on September 29. It is also borne out by his timecard—a card provided by his employer and from which he is paid and Respondent is billed. No time was deducted from Hammer's hours or pay for tardiness on September 29 or on any day that week. Emerick testified that employees had their pay docked if they were 5 minutes late. Presumably this would apply to Hammer as well as Nameche, who was docked 15 minutes pay on September 29. Hammer's testimony is not impeached because of his failure to recollect on which day of the week September 29 fell. Hammer properly focused on his time of arrival at the plant on September 29 because Nameche was fired that day and because, about a week later, he was warned for being late himself. Nor is it significant that Hammer testified to hearing a radio announcement at 6:56 that day and Nameche placed the announcement at 6:58. The important point is that they both focused on a radio announcement, made near the time they arived at the plant, to support the fact that they did arrive on time. More importantly, perhaps, neither Hammer nor Nameche was stopped

[5] Sipek denied having this conversation with Nameche. However, for reasons I shall discuss hereafter, I do not credit Sipek's testimony. I credit instead the testimony of Nameche whose candid demeanor impressed me and whose testimony concerning his arrival time at the plant was essentially corroborated by Hammer, who was also a candid and disinterested witness.

when they arrived at the plant or on the work floor and told they were late, even though Emerick and Sipek were allegedly checking the arrival times of employees for that very purpose. That the testimony of Hammer and Nameche is not perfectly symmetrical illustrates their candor and contrasts with the rehearsed precision with which Emerick and Sipek attempted to detail times and dates.

The testimony of Sipek and Emerick contradicts that of Hammer in two significant respects. I resolve both conflicts in favor of Hammer and against the version of Emerick and Sipek whose testimony I found unreliable.

First of all, I reject the testimony of Sipek and Emerick concerning an alleged admission by Hammer on September 29 that he had been late that morning. According to Sipek, about 7:15, he approached Hammer and said, "It's about time you got here," and Hammer replied, "I'm sorry I'm late." Hammer testified to no such conversation. I do not believe any such conversation took place. Respondent did not accuse Hammer of being late on September 29 and did not even ask Hammer what time he had arrived. This is unusual because, according to Sipek, this allegedly was the first time he was made aware that Nameche was late on September 29 since he knew that they both rode into work together. Sipek then allegedly mentioned the admission to Emerick at 7:30, thus making Emerick aware for the first time that Nameche might be late. There is really no explanation why Sipek reported Nameche for tardiness but did nothing about Hammer, and his testimony on this point was evasive. Moreover, Sipek made no mention of the Hammer admission in a signed unsworn statement Sipek prepared that very day in connection with Nameche's discharge. Nor did Emerick or Sipek mention this alleged admission in Nameche's discharge interview about noon on September 29. Considering that the alleged admission of Hammer first made both Emerick and Sipek aware of Nameche's tardiness, these omissions are very significant and render their testimony about the alleged admission completely unreliable. This unreliability on such a crucial issue infects their entire testimony and renders all of it suspect.

Both Emerick and Sipek also testified that, on September 30, Hammer was caught coming in late and that he admitted then that he had also been late the day before when Nameche was fired. Hammer testified that the incident occurred a week later and he did not make any admission he had been late on September 29. Hammer's timecard shows no deduction for lateness on September 30 and there is no documentary evidence—such as a complaint to Hammer's employer—that he had been late 2 days in a row on September 29 and 30. This, together with my favorable impression of Hammer's demeanor as a witness and Respondent's failure to focus on his alleged tardiness on September 29, convinces me that he was telling the truth and that Sipek and Emerick were fabricating when they testified about Hammer's admission on September 30 that he had been late on September 29.

Respondent's tardiness explanation fails to withstand scrutiny for other reasons. I have already adverted to the absence of any definition of tardiness and the ambiguity of the testimony of Sipek and Emerick in this respect. When Respondent monitored employees on September 29, it focused on the time they arrived on the production floor not on the time they arrived at the plant. Emerick testified that he observed four other employees come onto the production floor between 7:05 and 7:10 on September 29, including one person who allegedly arrived "around 8 or 9 after" 7 a.m. According to Emerick, Nameche arrived on the plant floor only 1 minute later. However, Emerick made no mention of any alleged tardiness to Nameche at the time and did not discharge Nameche until noon. He said nothing to Nameche because according to Emerick, "I wasn't aware he was tardy." Moreover, Respondent did not discipline Hammer or find him to be late even though it knew he arrived at the plant at the same time as Nameche. When viewed together with the confusing testimony of Sipek and Emerick as to what exactly constituted tardiness, and Sipek's evasive testimony as to why he reported Nameche's possible tardiness to Emerick, Respondent's conduct has no legitimate basis. It is clear that Respondent was not genuinely interested in the tardiness of any employees on September 29 but that it focused on establishing a pretext to discharge Nameche for his union activities, as was proposed sometime before by Respondent's labor relations agent.[6]

The record also reveals that Respondent's enforcement of its tardiness policy was not evenhanded and that, indeed, Nameche was the subject of disparate treatment. Under ordinary circumstances, it would be unusual that Nameche, the most senior of Respondent's employees and, according to Respondent, a supervisor with managerial-type responsibilities, would become the first person discharged under the no-fault program. I have already detailed the considerable evidence in support of my finding that Respondent's criteria for tardiness were unreliable. Moreover, it was admitted by Emerick that the only way employees knew they were in trouble under the no-fault program was if they were warned by him. Although a list showing the balances in each employees' no-fault account was posted for a few months after implementation of the program, the list was no longer posted after March 1981.

There is evidence in this record that other employees reported late and left early without being penalized. For example, according to the uncontradicted testimony of Hughes, he saw employee Al McDonald drive up to the plant late and leave early on numerous occasions in February and March 1981. When he asked Emerick why McDonald was permitted to violate the no-fault policy,

[6] Respondent contends that the timing of Nameche's discharge some 18 months after its proposal to fire him and 6 months after the election in the latest union campaign refutes any inference of discrimination. I reject this contention. First of all, when Nameche was discharged, Respondent was still contesting the election before the Board and pressing its view that Nameche was a supervisor. Moreover, the evidence in this case indicates that Respondent was interested in building a case against Nameche over a period of time. Only a foolhardy employer would summarily fire Nameche in the midst of a union campaign which he spearheaded. As the Fifth Circuit has stated:

> Today the employer seldom engages in crude, flagrant derelictions. Nowadays it is usually a case of more subtlety, perhaps the more effective, and certainly the more likely to escape legal condemnation.

NLRB v. Aero Corp., 581 F.2d 511, 515 (5th Cir. 1978).

Emerick told him it was none of his "damn business." Hughes also testified that he once answered a call to the plant that another employee, Larry Fletcher, was going to be late and that he told Emerick about it. Emerick said he would ignore the tardiness because Fletcher "was real close to his last warning." Although Emerick denied making this statement to Hughes, I credit Hughes whom I found to be a credible witness on other issues. Emerick was not a reliable witness and Hughes' testimony is consistent with other evidence set forth below concerning Respondent's actual treatment of tardiness offenses.

Respondent's failure to strictly enforce its no-fault program and its disparate treatment of Nameche are shown by its treatment of employee Joe Henderson. He received what apparently was his first written warning for both absenteeism and tardiness on September 16, 1981. The warning states that he had six absences and five tardiness violations since June 22, 1981. Since Henderson had been on leave from July 1980 until May 1981, it is unlikely that he could have overcome those six demerits by perfect attendance. He thus probably should have been discharged or at least given a second warning for absenteeism on September 16. He was not. Indeed, his employee attendance record lists only two absences, one of which was due to illness, from June to September. This not only demonstrates Respondent's loose practices in monitoring and enforcing its no-fault program, but also convincingly demonstrates that Respondent's employee attendance records are not accurate.

Henderson also testified that he was tardy or left early on several occasions in October and November 1981 but these instances were not recorded on his employee attendance record. This is not surprising since some of the absences listed on his September 16 warning were not listed on his attendance record. Henderson received a warning letter on October 5, 1981, criticizing his continued poor tardiness record and, on October 6, he was warned against scheduling doctors' appointments before the end of the workday. Henderson was finally issued his second written tardiness warning on November 11, 1981. At this point, under Respondent's own records, he had three demerits and would be discharged if he was tardy one more time before the end of December. Henderson was 1 hour late on December 21 because of inclement weather but he was not discharged or assessed a tardiness demerit even though Respondent clearly knew of the tardiness. Even apart from the inherent probability that Respondent would know about the 1 hour tardiness of one of its approximately 15 employees, the uncontradicted testimony is that Sipek spoke to Henderson when he came in and told Henderson that he would overlook the tardiness violation. Thus, Respondent did not strictly apply its no-fault policy to Henderson as it should have on December 21. It is immaterial that Henderson was subsequently discharged for being one-half hour late the next day. Had Respondent applied its no-fault policy as strictly as it allegedly was required to in Nameche's case, Henderson would have been fired on December 21.

In these circumstances, I find that the General Counsel has proved that Respondent violated the Act by discriminatorily discharging Nameche for his union activities and for testifying in a Board proceeding and that Respondent would not have discharged Nameche but for his protected activities.

CONCLUSIONS OF LAW

1. By discharging employees Steven Hughes and Michael Nameche for their union activities and for having testified against Respondent's interest in a Labor Board proceeding, Respondent has violated Section 8(a)(4), (3), and (1) of the Act.

2. Such violations constitute unfair labor practices which affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent unlawfully discharged employees Hughes and Nameche I shall recommend that Respondent be ordered to cease and desist from its unlawful conduct and to take certain affirmative action designed to effectuate the purposes of the Act. Respondent will be ordered to offer Hughes and Nameche full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any or all losses of earnings caused by Respondent's unlawful conduct. The amounts due shall be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[7]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Bliss and Laughlin Steel Company, Inc., Batavia, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, disciplining, or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment because they engaged in union activities or because they participate or testify in proceedings before the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights set forth in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to employees Steven Hughes and Michael Nameche full and immediate reinstatement to their former jobs or, it those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them

[7] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharges in the manner set forth in the remedy section of this Decision.

(b) Expunge from its files any reference to the discharges of Steven Hughes and Michael Nameche and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Batavia, Illinois, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order what steps have been taken to comply herewith.

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."